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1-800-933-6348

UIM Arbitration: 2009 Update

By: Pat Duffy
Mediator, Arbitrator

INSIDE THIS ISSUE

As Congress considers the proposed Arbitration Fairness Act of 2009 to address several problems with the use of contractual arbitration clauses (see HR 1020), it's a good opportunity to re-examine the evolution of arbitration in Washington and how changes in the act may impact arbitration as a method of resolving UM/UIM claims.

In the 1950's, insurers began to voluntarily offer uninsured motorist coverage to their insureds in exchange for payment of an additional premium. In the late 1960's, legislation was passed requiring insurers to offer uninsured motorist coverage. Later, some insurers began to offer policies that contained both uninsured and underinsured motorist coverage. In 1980, the legislature passed comprehensive uninsured/underinsured motorist legislation (which can be found at RCW 48.22.030).

Historically, automobile insurance policies have provided that UM/UIM injury claims would be decided by 3-person arbitration panels. Each party nominated one arbitrator and those two "party arbitrators" then agreed upon a neutral or "swing" arbitrator. Traditionally, a decision by a majority of the panel members was binding and the arbitrators' fees were shared equally by the parties. This format satisfied each side's desire to have its own "advocate" on the panel, although it certainly can be argued that the "party arbitrators" nullified each other and left the decision to essentially be made by the swing member of the panel.

But after the courts ruled in 1989 that payment of arbitrators under UM/UIM policies was the sole responsibility of insurers, there was a gradual transition by most carriers to the use of only one arbitrator. Using a sole arbitrator has undeniably saved insurers a substantial amount of arbitrator hearing fees.

Whether accurate or not, a perception began to develop with insurers that arbitrators' awards were overly generous in favor of claimants. This view led to the advent of "sue me" clauses, which are now common in UM/UIM policies. While most policies have continued to provide for arbitration, it was to be utilized only if both parties agreed to arbitrate. If not, the only option for claimants was to initiate a lawsuit for damages against the insurer. A typical policy might now read as follows:

If we and the insured do not agree…the dispute may be resolved:

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Washington Arbitration & Mediation Service is pleased to welcome…

Jean Magladry maintains an active trial practice in Bellevue Washington, where she emphasizes personal injury claims resolution involving motor vehicle accidents, medical malpractice, premises liability, aviation and products liability issues. She has specific experience with cases involving wrongful death and catastrophic injuries, having tried cases lasting four weeks or more. She is an Eagle member of the Washington State Association for Justice, a frequent speaker at seminars and formerly served on its Board of Directors.

Jean Magladry Mediator

Mr. Hanchett is Of Counsel with the Seattle law firm of Lasher Holzapfel Sperry & Ebberson. He started with the firm in 1988, focusing his legal practice in the area of debtor-creditor, commercial litigation and corporate financial matters. In 2005, he left the general practice of law and became in-house counsel for one of his long term clients, a real estate development company. In that capacity, he was in charge of negotiating complex acquisition contracts and the sale of developed properties to national home building companies as well as overseeing disputes and litigation associated with the real estate transactions. This combination of experiences in law and business has given Mr. Hanchett a unique perspective on problems and solutions involving corporations, financial institutions and small-business owners, in particular.

Mr. Hanchett's primary mediation practice focus is on commercial dispute resolution of cases generally involving fiduciary relationships, financial transactions, debtor-creditor problems and potential or actual litigation and/or bankruptcy. His client emphasis as a mediator includes banks and other financial institutions, profit/non-profit corporations and their Directors, small business owners, real estate companies and developers. He is an experienced litigator in Superior and Federal courts and is a frequent speaker at Continuing Legal Education seminars.

Kevin Hanchett Mediator

For more information about Jean Magladry and Kevin Hanchett, please call 206-467-0793.

...WAMS Buzzz

First, WAMS is supporting the American Cancer Society by sponsoring a Relay for Life Team at the Mt. Tahoma High School Relay for Life on June 12 and 13. Relay for Life is the world's largest not-for-profit fundraising event. More that $2 billion has been raised since Relay was first held in 1985. This is a worldwide movement that takes place in 19 countries outside the United States. The American Cancer Society Relay for Life represents the hope that those lost to cancer will never be forgotten, that those who face cancer will be supported, and that one day cancer will be eliminated. For more information about this program, please visit www.RelayForLife.org.

Next, WAMS mediator John Cooper has recently been advised by the International Mediation Institute (IMI) in The Hague (Netherlands) that he has been added to its list of Certified Commercial Mediators. The IMI is an international collaboration of several ADR organizations around the world whose objective is to establish a panel of certified mediators for international commercial disputes. IMI's website is found at www.imimediation.org.

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(a) In a binding arbitration proceeding, but only if both sides agree to arbitration, or
(b) By civil lawsuit brought by you in a court of competent jurisdiction.

Advocates for claimants have decried these changes and attempted, so far unsuccessfully, to have "sue me" clauses declared void. The plaintiff's bar has consistently argued that the high expense and protracted delay in getting to trial is placing an unfair burden upon insureds. In turn, the plaintiffs' bar has been soundly ridiculed for its so-called hypocrisy in attacking the right to trial by jury.

As of this writing in 2009, claimants and insurers continue to arbitrate many, if not most, uninsured/underinsured cases. Both sides have an interest in getting claims resolved without the delay and expense of a jury trial, and there is little argument about the cost and time savings associated with UM/UIM arbitration. In fact, many arbitrators like me are now seeing parties agree to resolve third-party claims in binding arbitration as an alternative to trial. There is often a "high-low" agreement, not disclosed to the arbitrator, which provides for the award to be modified if it falls outside the range set by the parties.

I think it's fair to say that arbitration is still widely viewed as an expeditious and cost-effective method of resolving UM/UIM claims. The benefits of arbitration are endorsed by Civil Rule 1 that states, in part:

> These rules...shall be construed and administered
> to secure the just, speedy and inexpensive determination of every action.

Arbitration should continue to serve as a popular method of dispute resolution for UM/UIM claims, since the benefits of arbitration are many, including:

- Reliability of the hearing date
- Privacy – no public record
- Special expertise of neutral
- Parties select neutral
- Expeditious compared to trial
- Achieves finality
- Very narrow scope of appeal
- Usually less costly than trial

The Arbitration Fairness Act will potentially impact UM/UIM arbitration only insofar as some policies may

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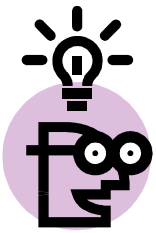
Arbitration article continued…

be considered to be "anti-consumer" by virtue of any discovery, timing, arbitrator or cost constraints that may still be used by some carriers. For the most part, however, UM/UIM arbitration in Washington is likely to remain a good choice for many disputed claims.



CASE OF INTEREST

A recent ruling by a Court of Appeals Division III panel in *Breuer v. Presta* (published opinion 26843-8-III) warrants consideration. It addresses the issue of what constitutes a "written, good faith request for mediation" for the purpose of tolling the statute of limitations in health care claims pursuant to RCW 7.70.110.

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www.usamwa.com

View our online calendar for last minute openings!!!

Michele Sales

"I really appreciated the way you kept mediation moving forward, as well as your recommendations for bridging the gap between the parties. All of us were pleased with the result we achieved and I'm certain that we wouldn't have gotten there without your expert assistance."

-WAMS client

Seattle
600 University Street
Suite 900
Seattle, WA 98101
Phone: 206-467-0793
Fax: 206-467-7810

Tacoma
3600 Port of Tacoma Rd
Suite 304
Tacoma, WA 98424
Phone: 253-922-4140
Fax: 253-922-5510

E-Mail: wams@usamwa.com

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